Supreme Court, U.S.
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No. 01-977

In The

Supreme Court of the United States

KENNETH G. HELFRICH,

Petitioner,

v.

PNC BANK, KENTUCKY, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Sup. Ct. R. 29(6), Respondent, PNC Bank, Kentucky, Inc. (which was succeeded as the result of a merger by PNC Bank, National Association), makes the following disclosure:

The indirect parent corporation of PNC Bank, National Association is The PNC Financial Services Group, Inc., f/k/a PNC Bank Corp. No other publicly held company owns 10% or more of PNC Bank, National Association's stock.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, PNC Bank, Kentucky, Inc. ("PNC"), respectfully requests that the Court deny the Petition for a Writ of Certiorari seeking review of the October 1, 2001 Opinion of the United States Court of Appeals for the Sixth Circuit.

STATEMENT OF THE CASE

PNC was Trustee/Custodian of the Bulk Distribution Centers, Inc. 401(k) Profit Sharing Plan, in which Petitioner, Kenneth G. Helfrich was a participant. PNC was a "directed trustee." The employer and plan sponsor, Bulk Distribution Centers, made investment decisions and directed all distributions from the Fund. For example, pursuant to the Basic Plan Document, PNC could make distributions from the Fund only "in accordance with the written instructions received from an authorized representative of the Employer." From the Plan's inception until October 1995, Helfrich, as Bulk Distribution Centers' owner and president, was the "Individual Authorized to Issue Instructions to the Trustee/Custodian." Thereafter, Donald L. Stump, who succeeded Helfrich as the company's owner and president, was the individual with such authority.

All of Helfrich's claims in this lawsuit arise from his desire to cease participation in the Bulk Distribution Centers Plan and invest his retirement funds elsewhere. Helfrich and Stump made requests, in the Spring of 1996, that funds in Helfrich's account (totaling $700,000) be

rolled over to certain mutual funds and that other funds (totaling $61,103.20) be distributed directly to Helfrich.

Before any transfer was made from Helfrich's account, the entire Plan was liquidated and forwarded to a new custodian and investment manager, Lincoln National Life Insurance Company. This action was taken in response to Stump's specific written instruction to "liquidate the plan assets as soon as administratively practicable on or after June 30, 1996." Lincoln National apparently held all Plan assets, including Helfrich's, in a money market fund during a six-month black-out period following the transfer. PNC, of course, played no role in either the selection of Lincoln National or the investment of funds after the transfer to it.

More than two years after PNC had, at Stump's request, liquidated the Plan and forwarded *all* its assets, including Helfrich's account, to the new trustee, Helfrich filed suit. Helfrich asserted various claims under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq.*, including a claim for breach of fiduciary duty under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3) [Complaint, Appendix D to Petition].[1] Helfrich sought to recover the difference between what his account earned in Lincoln National's money market

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[1] Helfrich also asserted a benefit denial claim under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), an interference with protected rights claim under ERISA § 510, 29 U.S.C. § 1140, and a breach of fiduciary duty claim under ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2). All of these claims were dismissed by the District Court [Memorandum Opinion and Order, Appendices B and C to Petition] and Helfrich did not appeal therefrom.

fund and what it would have earned in his chosen mutual funds.

There were, and remain, significant disputes regarding *why* the transfers that Helfrich desired did not take place. But these factual issues necessarily were put aside when PNC moved for dismissal of Helfrich's breach of fiduciary duty claim on legal grounds.[2]

PNC pointed out that Helfrich's requested remedy – lost investment earnings – would not be recoverable under ERISA § 502(a)(3) *even if* Helfrich could prove the disputed allegations of his Complaint. PNC's argument was based on established law. Section 502(a)(3)(B) grants plan participants the opportunity to recover only "other appropriate *equitable* relief. . . . " (emphasis added). This Court, in *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993), plainly held that this section does not authorize the

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[2] Helfrich asserts in his Petition that "[i]t is undisputed that Respondent agreed to invest Petitioner's funds in accordance with his instructions and failed to perform this contractual duty" [Petition at 3]. Because this case was decided on a motion to dismiss or alternatively for summary judgment, PNC must, of course, *assume* the facts alleged by Helfrich to be true. *Summitt Health, Ltd. v. Pinhas*, 500 U.S. 322, 325 (1991); *Nixon v. Kent County*, 76 F.3d 1381, 1384 n.3 (6th Cir. 1996). But had this matter not been resolved on legal grounds, PNC would have challenged many of the "facts" set forth by Helfrich and defended the claim on the merits as it would have had every right to do. Indeed, as Helfrich is well aware, PNC has always maintained that it acted entirely appropriately under the circumstances. First, what Helfrich wanted was improper on its face, in part because the requested transfers exceeded the amount of money available for rollover and distribution. Second, both Stump and the Plan's attorneys subsequently gave contradictory instructions to PNC.

recovery of compensatory damages. *Id.* at 255. In the context of § 502(a)(3), Justice Scalia found there to be "no doubt" that "equitable relief" means only "those categories of relief that were typically available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)." 508 U.S. at 257. The District Court nevertheless let stand Helfrich's breach of fiduciary claim under that section. Citing a pre-*Mertens* decision from the Sixth Circuit Court of Appeals, *Warren v. Society Nat. Bank*, 905 F.2d 975 (6th Cir. 1990), *cert. denied*, 500 U.S. 952 (1991), the District Court found that the relief sought by Helfrich was "in the nature of restitution" and, therefore, recoverable [Memorandum Opinion, Appendix B to Petition, at 38a].[3]

An interlocutory appeal was made to the Sixth Circuit Court of Appeals. The sole issue presented to the appellate court was whether the relief sought by Helfrich was equitable (and potentially recoverable) or legal (and not recoverable). The Court of Appeals properly applied *Mertens* and reversed the District Court's decision. The court found that, pursuant to *Mertens*, "money damages, as traditionally understood, are not encompassed within the phrase 'appropriate equitable relief' " [Opinion, Appendix A to Petition, at 8a]. The appellate court concluded:

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[3] The District Court's reliance on *Warren* was curious given the fact that the Sixth Circuit Court of Appeals had already recognized that "*Mertens* effectively overrules *Warren*." *Fraser v. Lintas: Campbell-Ewald*, 56 F.3d 722, 725 (6th Cir.), *cert. denied*, 516 U.S. 975 (1995).

> ERISA does not permit plan beneficiaries to claim money damages from plan fiduciaries. Confronted with this obstacle to recovery of his loss, Helfrich denominated his requested relief as "restitution" while measuring that relief with reference to his losses rather than PNC Bank's gains. That measure is the hallmark of money damages. . . . [T]he Supreme Court has specifically disallowed money damages as "appropriate equitable relief" under ERISA. . . .

Id. at 12a.

REASONS TO DENY WRIT

Review on a writ of certiorari is a matter purely of judicial discretion, to be granted only for the most compelling reasons. Petitioner Helfrich asserts that lower courts have interpreted ERISA § 502(a)(3)'s "appropriate equitable relief" provision inconsistently. Whether or not some court somewhere may have misapplied the law, the Sixth Circuit Court of Appeals in *this* case decided the issue fully and correctly in a decision comporting entirely with precedents from both this Supreme Court and other circuits. Moreover, any doubt, reasonable or otherwise, as to the meaning of "appropriate equitable relief" was resolved by this Court's decision in *Great-West Life & Annuity Ins. Co. v. Knudson*, ___ U.S. ___, 122 S. Ct. 708 (2002), announced the very day that Helfrich's Petition was docketed. There is no compelling reason to grant the Petition.

I. THE COURT OF APPEALS CORRECTLY FOLLOWED ESTABLISHED PRECEDENT IN HOLDING THAT LOST INVESTMENT EARNINGS ARE COMPENSATORY DAMAGES NOT RECOVERABLE UNDER ERISA § 502(a)(3).

What Helfrich wants are lost investment earnings, specifically the profits he would have made on his chosen mutual funds had the Bulk Distribution Centers Plan not been frozen in a money market account at Lincoln National during the last six months of 1996. Although the Complaint includes the magic words "[a]ppropriate equitable relief including but not limited to, restitution . . . " [Complaint, Appendix D to Petition, at 46a], the Sixth Circuit Court of Appeals recognized that, regardless how Helfrich characterizes it, what he seeks are "money damages," which are not recoverable under ERISA § 502(a)(3) [Opinion, Appendix A to Petition, at 12a].

The Court of Appeals' decision was fully in accord with *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993), in which the plaintiffs sought money damages from their retirement plan's actuary. Like Helfrich here, the *Mertens* plaintiffs maintained that "the object of their suit" was " 'appropriate equitable relief' under § 502(a)(3)." *Id.* at 255. Also like Helfrich, the *Mertens* plaintiffs did not "seek a remedy traditionally viewed as 'equitable,' such as injunction or restitution."[4] *Id.* Justice Scalia, writing for

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[4] In his Petition, Helfrich repeatedly asserts that PNC's counsel "admitted" at oral argument that he "would have had a right to an equitable remedy, in the form of an injunction, if Respondent had provided full information to the Petitioner

(continued)

the majority in *Mertens*, made clear that it is the nature of the remedy sought, not what plaintiffs choose to call it, that is determinative: "Although they often dance around the word, what petitioners in fact seek is nothing other than compensatory damages – monetary relief for all losses their plan sustained as a result of the alleged breach of fiduciary duties. Money damages are, of course, the classic form of *legal* relief." *Id.*

This Court in *Mertens* found there to be "no doubt" that, in the context of § 502(a)(3), "equitable relief" means only "those categories of relief that were *typically* available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)." *Id.* at 256. The Sixth Circuit Court of Appeals appropriately found that, as in *Mertens*, Helfrich's chosen remedy is not equitable and, therefore, is not recoverable under ERISA § 502(a)(3).

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from the outset" [Petition at 5; *see also* Petition at 6, 11-12]. Obviously, the appellate court did not find such an "admission," if it even existed, to be significant as it is not even mentioned in the Court of Appeals' Opinion. What Helfrich is taking out of context is merely the recognition that an injunction ordering the trustee in possession of the Fund (whether PNC or, later, Lincoln National) to distribute Helfrich's account according to his wishes would be the sort of relief typically available in equity that § 502(a)(3) allows. The entitlement to such a remedy, of course, would depend on whether Helfrich was able to establish a valid claim of fiduciary breach.

II. ANY CONFLICT IN THE CIRCUITS WAS RESOLVED BY *GREAT-WEST LIFE & ANNUITY INS. CO. V. KNUDSON*

Helfrich frames the question for review as "whether ERISA's 'appropriate equitable remedy' provision . . . provides for restitution only upon a showing of unjust enrichment on the part of the fiduciary. . . . " [Petition at i]. Relying primarily on a single decision from the Second Circuit Court of Appeals, *Strom v. Goldman, Sachs & Co.*, 202 F.3d 138 (2nd Cir. 1999), and what he sees as the "particular nuances" of other cases, Helfrich asserts that courts have answered the question "inconsistently" [Petition at 8, 9]. Helfrich dances around the fact that, aside from the Second Circuit, every federal appellate court that has considered the issue since *Mertens* found, either explicitly or implicitly, that the equitable restitution recoverable under § 502(a)(3) requires some element of unjust enrichment.[5] This reflects that there has been much less confusion than Helfrich suggests.

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[5] *See Larocca v. Borden, Inc.*, 276 F.3d 22, 28 (1st Cir. 2002) (citing Dobbs, *Law of Remedies* § 3.1 for the rule that "restitution is measured by the defendant's unjust gain"); *Wood v. Prudential Ins. Co. of America*, 207 F.3d 674, 685 (3rd Cir.), *cert. denied*, 531 U.S. 927 (2000) (ERISA § 510 claim "cannot be characterized as an equitable one for restitution because the money sought is not being wrongfully held by the employer"); *Cement Masons Health & Welfare Trust Fund v. Stone*, 197 F.3d 1003, 1006 (9th Cir. 1999), *cert. denied*, 2002 WL 32432 (Jan. 14, 2002) ("restitution, as used in § 1132(a)(3), means 'ill-gotten gains' "); *Kerr v. Charles F. Vatterott & Co.*, 184 F.3d 938, 944 (8th Cir. 1999) ("A restitutionary award focuses on the defendant's wrongfully obtained gain while a compensatory award focuses on the plaintiff's loss at the defendant's hands."); *Fotta v. Trustees of*

If there was any substantial conflict, however, it was remedied by this Court just a few weeks ago in *Great-West Life & Annuity Ins. Co. v. Knudson*, ___ U.S. ___, 122 S. Ct. 708 (2002). Looking to "standard current works such as Dobbs, Palmer, Corbin, and the Restatements," 122 S. Ct. at 716, Justice Scalia in *Knudson* explained that "not all relief falling under the rubric of restitution is available in equity." *Id.* at 714. "[F]or restitution to lie in equity, the action generally must seek not to impose personal liability on the defendant, but *to restore to the plaintiff particular funds or property in the defendant's possession.*" *Id.* at 714-715 (emphasis added).

Because the funds to which the *Knudson* plaintiffs claimed entitlement were not in the defendants' possession, their claim could not be considered equitable restitution. *Id.* at 715. Helfrich's claim suffers from the same flaw. PNC long ago transferred the entire Bulk Distribution Centers Plan, including Helfrich's account, to the new trustee. It did not profit in any way from the actions or inactions about which Helfrich complains. As the Sixth Circuit Court of Appeals stated, in complete accord with *Knudson*, "there is nothing to *restore* to Helfrich, and

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U.M.W.A. Health & Ret. Fund, 165 F.3d 209 (3rd Cir. 1998) (recovery of interest on past due benefits allowed to prevent unjust enrichment); *Adams v. Cyprus Amax Minerals Co.*, 149 F.3d 1156, 1162 (10th Cir. 1998) (citing *Restatement (First) of Restitution*, "[b]y definition, an action for restitution has for its primary purpose the 'taking from the defendant and restoring to the plaintiff something to which the plaintiff is entitled' "); *Harris Trust & Savings Bank v. Provident Life & Acc. Ins. Co.*, 57 F.3d 608, 615 (7th Cir. 1995) ("Restitution is available . . . 'only when one party has been enriched at another's expense.' ").

therefore no basis for restitutionary relief" [Opinion, Appendix A to Petition, at 8a].

If guidance was needed on this particular issue, it has already been given. After *Knudson*, there can be no doubt that the form of restitution "typically available in equity" and, therefore, available under ERISA § 502(a)(3), is limited to "the return of identifiable funds (or property) belonging to the plaintiff and held by the defendant . . . ." *Knudson*, 122 S. Ct. at 716. "Because . . . [Helfrich is] seeking legal relief – the imposition of personal liability on . . . [PNC] for a contractual obligation . . . – § 502(a)(3) does not authorize this action." *Id.* at 719.

III. HELFRICH'S POLICY ARGUMENTS HAVE ALREADY BEEN CONSIDERED AND REJECTED BY THIS COURT.

Helfrich asserts that policy considerations support his claim for "make-whole" money damages under § 502(a)(3) [Petition at 12-17]. But as this Court noted in *Mertens* and again in *Knudson*, " 'vague notions of a statute's "basic purpose" are . . . inadequate to overcome the words of its text regarding the *specific* issue under consideration.' " *Knudson*, 122 S. Ct. at 718 (quoting *Mertens*, 508 U.S. at 261). This Court cautioned against doing precisely what Helfrich seeks – "attempt[ing] to adjust the 'carefully crafted and detailed enforcement scheme' embodied in the text that Congress has adopted." *Id.* (quoting *Mertens*, 508 U.S. at 254).

This Court also rejected, in *Knudson*, Helfrich's suggestion that *Varity Corp. v. Howe*, 516 U.S. 489 (1996), makes § 502(a)(3) "a catchall provision that authorizes *all*

relief that is consistent with ERISA's purposes and is not explicitly provided elsewhere." *Knudson*, 122 S. Ct. at 719 n.5. As Justice Scalia noted, it was undisputed in *Varity* that the plaintiffs were seeking equitable relief; the only issue there was whether it was "appropriate." *Id.* Moreover, to accept this argument would be "to ignore the plain language of the statute." *Id.*

The Sixth Circuit Court of Appeals correctly focused on the statute itself and *Mertens*, rather than on "vague notions" of ERISA's "basic purpose." This Court's recent decision in *Knudson* resolved any conceivable doubt that the appellate court's decision was correct. There are no compelling reasons for granting Helfrich's Petition.

CONCLUSION

Respondent, PNC Bank, Kentucky, Inc., respectfully requests that the Court deny the Petition which seeks review of the Sixth Circuit Court of Appeals' October 1, 2001 Opinion.

Respectfully submitted,

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